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CHARLES ELMORE CRO
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1951.

No. 533

WALTER H. FOSTER, ET AL.,
Petitioners,

vs.

GENERAL MOTORS CORPORATION,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

DEFINITIONS AND ABBREVIATIONS USED HEREIN.

In the interests of convenience and brevity, the following expressions used in this brief shall be taken to mean:

Act—The Selective Training and Service Act of 1940, as amended, 50 U. S. C. A. Appendix, Sec. 308.

Union—International Union, United Automobile, Aircraft and Agricultural Implement Workers of America, affiliated with the Congress of Industrial Organizations, the duly certified collective bargaining agent for petitioners.

1946 Agreement—Collective bargaining agreement between the Corporation and the Union dated March 19, 1946.

Strike—The strike called by the Union against the Corporation on November 21, 1945, and which continued until March 13, 1946.

STATEMENT OF THE CASE.

Petitioners' statement at pages 3-8 of their petition consists principally of argument and comment. Briefly stated, the facts of the case are as follows:

Petitioners' complaint (R. 1-4) asserted a class action, on behalf of all of respondent's veteran employees, to recover vacation pay for the years 1946. It was conceded that petitioners were not entitled to such vacation allowance by the terms of the 1946 Agreement, but it was claimed that the 1946 Agreement violated the Act because respondent's returned-veteran employees had little or no 1945 earnings on which to base vacation pay under the 1946 Agreement.

Respondent thereafter filed its motion for summary judgment, together with two supporting affidavits. Petitioners never attempted to file any counter affidavits or affidavits under Rule 56(f) explaining their inability to file counter affidavits.

Respondent's affidavits show the following facts:

Petitioners are all veterans and hourly-rated employees of the respondent. Each of them left his position of employment with respondent to enter military service, applied seasonably for reinstatement to his job and has otherwise met the requirements for reinstatement of Section 8 of the Act. Each was reinstated in his employment in accordance with the Act. (R. 37.)

Petitioners were and are members of the Union and at all pertinent times were members of a bargaining unit for which the Union had been duly certified bargaining agent by order of the National Labor Relations Board. (R. 37.)

The named petitioners received all vacation allowance, if any, due them by respondent prior to the date of their respective military leaves. (R. 39.)

Vacation allowance for hourly-rated employees was the subject of annual negotiations and agreement between the respondent and the Union every year from 1940 to 1946. The various vacation allowance agreements were sometimes agreed upon and sometimes dictated by the government. (R. 41.)

The vacation provision of each agreement from 1940 to 1947, inclusive, can be found in the Seaton affidavit. (R. 43 to 54 inclusive.) Generally, to qualify for a vacation allowance prior to 1946, the employee must have been working for respondent at least one year, *i. e.*, have one year's seniority; and he must have still been working for respondent at the end of the vacation year, July 1st to June 30th, or laid off subsequent to May 1st. If not so working at the end of the year or not so laid off, he could qualify only if he had worked 75% of the work weeks during the vacation year.

In the fall of 1945, in accordance with annual practice, respondent and the Union commenced negotiation on a new collective bargaining agreement including provisions for vacation allowance for 1946. While these negotiations were in progress the Union called a strike which commenced on November 21, 1945, and lasted until March 13, 1946. Said negotiations continued throughout the strike period. (R. 49.)

Respondent proposed to the Union that in lieu of vacation with pay for the year 1946 each employee with one year of seniority on July 1, 1946, would receive a vacation allowance of 40 hours pay and each employee with five or more years of seniority on July 1, 1946, would receive a vacation allowance of 80 hours' pay, provided each such

employee worked 75% of the pay periods during the period mutually agreed upon as the vacation year. The respondent further proposed that an employee who did not qualify under this proposal could nevertheless receive 2% or 4% of his total earnings during the period July, 1945, to July, 1946, depending upon his seniority, as his vacation allowance. (R. 49, 50.)

The Union rejected these proposals stating their reason to be that few employees would qualify for such a vacation allowance in view of the extensive layoff periods necessitated by the conversion from wartime to peacetime operations and because of the length of the strike. (R. 50.)

Respondent then suggested a vacation allowance equal to 2% of total earnings for employees with one or two years seniority, 3% for employees with three to five years seniority, and 4½% for employees with seniority of more than five years with the period from July, 1945, to July, 1946, as the earning period against which such percentages would apply. (R. 50.)

The Union countered with the proposal that the calendar year 1945 be used as the earning period, arguing that by using this base those employees who had been on strike since November 21, 1945, would not receive the full impact of the time lost in one vacation year. (R. 50, 51.)

At that time respondent pointed out to the Union that certain employees who had not worked during the calendar year 1945, would receive substantially less by using 1945 as the base period as suggested by the Union than by using the period suggested by the defendant. (R. 51.)

The Union was adamant in its position and asserted that the strike could not be settled unless the Union's counter-proposal as to vacation allowance was accepted. Finally, on March 13, 1946, respondent capitulated and the 1946

agreement was executed with the following provision for vacation allowance:

> "Any employee with one or more years' seniority as of July 1, 1946, who works during the pay period beginning June 24, 1946, and ending June 30, 1946, in any General Motors plant or who has been laid off after May 1, 1946, shall be eligible for vacation allowance on the following basis:
>
> '(a) An employe with one year but less than three years' seniority as of July 1, 1946, shall be compensated on the basis of 2% of his gross earnings for the period from January 1, 1945 to December 31, 1945.'
>
> [Paragraphs (b) and (c) are similar to (a) but provide graduated percentages according to years of seniority.]
>
> "Each factory employe having one or more years' seniority who is ineligible for vacation pay under the first paragraph above, shall be entitled to a vacation allowance as provided in Paragraphs a, b and c, above, based upon his seniority as of July 1, 1946, provided he has worked during 26 pay periods between the dates of July 2, 1945 and June 30, 1946 in General Motors plants. The vacation allowance of such employes shall be based upon their gross earnings in all General Motors plants during the calendar year 1945." (R. 52-53.)

None of the named petitioners was in the active employ of respondent during 1945 and none received any wages from respondent during that year. (R. 37, 39.)

The 1946 Agreement, like prior agreements between the Union and respondent, contemplated leaves of absence without loss of seniority for reasons other than military service. Such reasons included illness and Union business. (Secs. 106, 109.) The 1946 Agreement also protected an employee with five or more years of service from loss of his accumulated seniority although laid off for a period up to five years. (Sec. 64(e).) Paragraphs 104 and 105 of that agree-

ment provided for formal leaves of absence without loss of seniority and Paragraphs 106 and 108 provided for sick leaves upon the same terms. Paragraphs 109 and 110 provided for leaves of absence up to one year when taken in connection with Union business. In the event that any non-veteran employee, although retaining his seniority, did not work and received no pay during the calendar year 1945, he was entitled to no vacation allowance by the 1946 Agreement, although he may have worked steadily during the calendar year 1946 after the period of the strike. (R. 54.)

On this record, the District Court entered summary judgment for respondent and the Court of Appeals affirmed that judgment for the reasons set forth in its opinion. (R. 108-118.)

SUMMARY OF ARGUMENT.

I. The same questions presented here as to the rights of respondent's re-employed veterans to vacation pay for 1946 under the Act, in view of the provisions of the 1946 Agreement, have been determined the same way by the Court of Appeals for the Third Circuit in a decision this Court refused to review. No new reasons are advanced here for granting a writ of certiorari in this case.

II. The discrimination question presented is whether the 1946 Agreement discriminated against veterans because under it they received little or no vacation pay. The 1946 Agreement treats returned veterans the same as non-veteran employees on furlough or leave of absence during 1945 and does not discriminate against veterans. Comparison of the number of veterans affected with the number of non-veterans affected under the 1946 Agreement has no bearing on the question of discrimination. The record shows that the adoption of 1945 as the base period for determining vacation pay was done at the Union's insistence to protect the employees from the full impact of time lost during the Strike, and such facts do not render the 1946 Agreement discriminatory or illegal.

III. Petitioners neither filed any counter affidavits showing any dispute as to the facts stated in respondent's affidavits, nor filed any affidavit explaining their inability to do so. The facts as to the negotiations of the 1946 Agreement were fully available to them since their own collective bargaining agent, the Union, was a party to those negotiations. The courts below were, therefore, justified in accepting the facts set forth in respondent's affidavits as undisputed for purposes of entering summary judgment.

IV. Vacation pay is not an element of "seniority, status, and pay" and the right thereto stems from the Union contract. Veterans are not entitled to recover vacation pay under the escalator principle as though they had worked continuously while in military service but are only entitled to the same treatment accorded non-veteran employees on furlough or leave of absence. Veterans are bound by changes in the Union contracts so long as such changes do not discriminate against them because of their absence in military service.

ARGUMENT.

1. This Court Has Already Declined to Review the Decision of Another Court of Appeals Reaching the Same Result on the Same Issues, and No New Reason Is Advanced Here for Granting the Writ in This Case.

The identical question of the rights of respondent's returned-veteran employees to vacation pay for the year 1946 under the Act has already been adjudicated in another Circuit in the case, *Dougherty* v. *General Motors Corp.* (C. A. 3, 1949), 176 F. 2d 561. There, as here, it was held that the provisions of the 1946 Agreement did not impair the rights of respondent's returned-veteran employees under the Act. The same questions now urged were presented to this Court by a petition for a writ of certiorari in the *Dougherty* case, but this Court denied such petition (1950), 338 U. S. 956.

Substantially all of the material facts in the *Dougherty* case were stipulated, and the stipulation (Dougherty R. 10-20) sets forth precisely the same facts shown by respondent's affidavits presented here (R. 36-54) except that the affidavits here also show the history of the negotiations of the 1946 Agreement and the details of the 1947 agreement relating to vacation pay, the facts as to which the Court of Appeals in the *Dougherty* case indicated would materially reinforce their decision (176 F. 2d at 563).

While the Dougherty decision is not technically *res judicata* as to petitioners, except as to Dougherty himself as a member of the class, it is clearly a precedent entitled to great weight, and was so regarded by the Court of Appeals below. (R. 110-111.)

It is likewise of some significance for present purposes

that the two Courts of Appeals which have considered the identical questions presented here have reached the same conclusion. While this Court's denial of certiorari in the *Dougherty* case has no independent legal significance here, it is only fair to note that the present petition advances no new reasons for granting the writ which have not been already considered by this Court and found wanting.

2. The Vacation Pay Provisions of the 1946 Agreement Do Not Constitute a Wrongful Discrimination Against Returned Veterans.

Petitioners' discrimination theory advanced here is difficult to understand, but seems to be predicated on the idea that discrimination results because more of the re-employed veterans were adversely affected than any other group of employees. It is worthy of note that petitioners make no charge here that the 1946 Agreement was adopted in bad faith as a device of hostility toward re-employed veterans. Such a theory was suggested in the briefs below, but the Court of Appeals completely answered any charge of that character (R. 115-118), and petitioners have made no attempt to resurrect such a claim in their statement of the questions presented. (Petition, p. 2.)

It is, of course, clear that all veterans absent in the service and all non-veteran employees on leave of absence during 1945 were treated alike. The 1946 Agreement provides for equal treatment, and no claim is made in the complaint or elsewhere that respondent has ever, let alone in 1946, paid vacation pay to non-veterans contrary to the applicable contract provisions.

Under the circumstances, if petitioners are given vacation pay rights for the year 1946, it will necessarily discriminate in their favor as veterans and against the non-veteran employees who received such vacation pay only on

the basis of their 1945 earnings. The courts have uniformly held that the Act requires no such discriminatory treatment in favor of veterans.

The cases involving re-employed veterans' rights to vacation pay are uniform in their treatment of the problem. The consistent holding is that the re-employed veteran is entitled to be treated like non-veteran employees on furlough or leave of absence, but no better, since the Act does not authorize any discrimination against non-veteran employees in favor of the re-employed veterans. The list of vacation pay decisions applying this rule is long. In addition to the cases cited by the Court of Appeals here (R. 110-113), the following may be added: *Brown* v. *Watt Car & Wheel Co.* (C. A. 6, 1950), 182 F. 2d 570, 572, cert. den. 340 U. S. 875; *Woods* v. *Glen Alden Coal Co.* (M. D. Pa. 1947), 73 F. Supp. 871; *Cushnier* v. *Ford Motor Co.* (E. D. Mich. 1950), 89 F. Supp. 491, 494-7; *Monticue* v. *Baltimore & O. R. Co.* (N. D. Ohio 1950), 91 F. Supp. 561.

These cases all deny the applicability of any test of discrimination based on the comparative numbers of veterans and non-veterans affected. As the court noted in the parallel case, *Dougherty* v. *General Motors Corp.* (C. A. 3, 1949), 176 F. 2d 561:

> "* * * We are not unaware that, since few veterans were restored to their positions with General Motors until the closing months of 1945 at the earliest, the interpretation of the contract with General Motors espouses and the district court adopted means that veterans restored to duty with that company receive little, if any, vacation pay for the year 1946. * * *
>
> "It is clear, therefore, that the 1946 vacation pay provisions cannot be declared illegal as to Dougherty simply because their effect is to deny him—and any other General Motors employee, veteran or non-veteran, who had no 1945 gross earnings—1946 vacation pay." (176 F. 2d 562-563.)

The rule is that it is not unlawful to deny the veteran vacation pay unless the employer has an established rule to give such pay to employees on leave of absence. No claim is or can be asserted here that respondent had any such established rule.

Unless the courts in all of the prior decisions have been consistently misconstruing the Act, the decision here attacked is the only one the court below could have reached.

3. Summary Judgment Was Properly Entered.

As has been heretofore noted, the affidavits submitted in support of respondent's motion for summary judgment set forth all of the facts presented in the parallel case, *Dougherty* v. *General Motors Corp.* (C. A. 3, 1949), 176 F. 2d 561, and in addition showed the history of the negotiations of the 1946 Agreement, which the Court of Appeals for the Third Circuit had indicated would materially reinforce their decision. (176 F. 2d at 563.)

Petitioners made no attempt to file counter affidavits, although they undoubtedly had access to the facts as to the 1946 negotiations. Those negotiations were carried on with the Union, as petitioners' representative for collective bargaining, and there is no reason to believe petitioners' own Union would deny them a full disclosure of the facts, as the Court of Appeals here noted. (R. 117.) Again, as the Court of Appeals noted, petitioners always had access to the provisions of Rule 56(f) in the event they wished to controvert in good faith the facts set forth in respondent's affidavits but were unable to do so by affidavits of anyone having first-hand knowledge of the facts. (R. 117.) Yet petitioners made no attempt to make any showing of any factual disagreement with respondent's affidavits. Certainly if the accuracy of what was said in the 1946 negotiations was to be contested by petitioners, they had ample

avenues open to them to show that there was some real dispute about the facts.

The reasoning of the Court of Appeals on the summary judgment question raised here (R. 116-117) is a complete answer to objection here urged. Indeed, unless Rule 56(f) is to be read out of the Federal Rules of Civil Procedure, it seems to be the only proper answer.

The cases cited by petitioners as presenting some different rule hardly bear out what is claimed for them. The two Second Circuit cases cited for the proposition that where credibility is involved, an issue of fact necessarily exists, do contain some broad statements that would probably require an automatic refusal of any summary judgment on affidavits if taken to their logical conclusion. The facts show that a narrower reading is necessary. Thus, in *Arnstein* v. *Porter* (C. A. 2, 1946), 154 F. 2d 464, the issues were whether defendant knew of plaintiff's compositions and had copied them. Defendant denied knowledge and copying under oath. However, plaintiff did show other facts indicating a definite possibility of knowledge. The court held defendant's denial could not be held to foreclose any issue of fact. The decision is thus not unwarranted on the facts, for even *unconscious* plagiarism would suffice to make a cause of action, *Edward & Deutsch Lith'g Co.* v. *Boorman* (C. A. 7, 1926), 15 F. 2d 35, 37, cert. den. 273 U. S. 738, and obviously defendant himself could not and did not produce any evidence on that point.

In *Colby* v. *Klune* (C. A. 2, 1949), 178 F. 2d 872, the main issue was the extent of the authority and duties of a corporate employee to determine whether he was an "officer" under an S. E. C. regulation. As shown by the opinion of the trial court, 83 F. Supp. 159, affidavits and counter affidavits were filed. The issue obviously was one not to be proved on the evidence of any one witness and the court held a summary judgment improper.

The broad statements made in these decisions clearly are not followed rigidly by the Second Circuit itself. *Radio City Music Hall* v. *U. S.* (C. A. 2, 1943), 135 F. 2d 715, 718; *Engl* v. *Aetna Life Ins. Co.* (C. A. 2, 1943), 139 F. 2d 469, 472-3.

Farrall v. *District of Columbia Amateur Ath. Union* (C. A. D. C. 1946), 153 F. 2d 647, presents the case where the affidavits supporting the motion for summary judgment did not cover three of the charges made in the complaint. (153 F. 2d at 650.)

In *Garrett Biblical Inst.* v. *American University* (C. A. D. C. 1947), 163 F. 2d 265, the issue was whether gifts of money to plaintiff were made without restriction as to their use. Plaintiff's affidavit contained the conclusion that there was no restriction, but gave no supporting facts other than a reference that "a careful search of the documents relating to the terms of the award * * * together with the attendant circumstances of the gift" made clear to it such a conclusion. (163 F. 2d at 267.) Such an affidavit clearly does not comply with Rule 56(e) and could hardly be urged as *proof* of the ultimate fact.

4. Petitioners Are Not Entitled to Recover Under the Escalator Principle.

While petitioners go to some length to discuss the escalator principle as a theory of recovery, it is difficult to find the point under their statement of the questions presented. (Petition, p. 2.) In any event, the authorities are uniformly contrary to their position.

The vacation pay cases uniformly deny the application of the escalator principle as a means of giving re-employed veterans a discriminatory edge over non-veterans. The present case and its parallel case, *Dougherty* v. *General*

Motors Corp. (C. A. 3, 1949), 176 F. 2d 561, 563-4, cert. den. (1950), 338 U. S. 956, are plain on the point. These decisions are not unique. In *Siaskiewicz* v. *General Electric Co.* (C. A. 2, 1948), 166 F. 2d 463, 465-6, the court held that vacation pay had no relation to the "seniority, status and pay" of § 8(c), and said in part:

> "Appellants argue that, in refusing to give them vacation pay, the company failed to restore them to their former position, or a position of like seniority, status and pay, and failed to restore them without loss of seniority, thus violating section 8(b) (B) and (c) of the Selective Training and Service Act. The company concedes that, if appellants are entitled to vacation pay, the amount of that pay will be determined by appellants' seniority. *But right to vacation pay stems from the union contract, and that contract does not provide for vacation pay based on seniority alone.* Seniority consists of a relative position among all employees within a specified job group, determined by length of service with the employer, and controlling, to the extent provided for in the contract, such matters as layoffs and promotions and such other benefits as vacations.
>
> "* * * Since vacation rights are not pay unless they are for work actually done, and since they are not merely a perquisite of seniority, they must fall under the heading of 'other benefits.' Hence, under the language of the Act, appellants must be treated like non-veteran employees on furlough or leave of absence." (166 F. 2d 465-6.)

Practically all of the vacation pay cases adopt the same test as to the veterans' rights—unless it can be shown that the employer has an established practice of granting vacation pay to employees on leave of absence, the returning veteran has no right thereto.

The theory underlying these cases is that vacation pay rights stem from and must be governed by the union con-

tract creating such rights. They clearly are not an element of seniority and pay even though vacation pay is calculated to grant relief from and compensation for work already performed, as the courts have noted both in the *Dougherty* case and the *Siaskiewicz* case. In the present case, vacation pay agreements were separately negotiated between the respondent and the Union each year, and were changed from year to year. So long as the agreements so made do not discriminate against veterans, they are binding on veteran and non-veteran employees alike. *Aeronautical Industrial Dist. Lodge* v. *Campbell* (1949), 337 U. S. 521, 525-6, 530; *Gauweiler* v. *Elastic Stop Nut Corp.* (C. A. 3, 1947), 162 F. 2d 448, 451; *Cushnier* v. *Ford Motor Co.* (E. D. Mich. 1950), 89 F. Supp. 491, 495. This, of course, is the analysis of the *Dougherty* decision and is well supported.

Changes in the underlying employer-employee contract are, indeed, the rule, not the exception. As this Court noted in *Aeronautical Industrial District Lodge* v. *Campbell* (1949), 337 U. S. 521, 525:

> "It is of the essence of collective bargaining that it is a continuous process. Neither the conditions to which it addresses itself nor the benefits to be secured by it remain static. They are not frozen even by war."

The courts in other fields have held that the escalator principle does not apply to all cases indiscriminately to require that veterans be given rights as though every day in service had been a day worked. The test is whether veterans are treated less favorably than non-veteran employees on leave of absence. *Zagaiski* v. *Carboloy Co.* (E. D. Mich. 1950), 88 F. Supp. 162, 166; and pay increases in the nature of merit increases, *Nevins* v. *Curtiss-Wright Corp.* (C. A. 6, 1949), 172 F. 2d 535; *Altgens* v. *The Associated Press* (C. A. 5, 1951), 188 F. 2d 727. These cases all reject any recovery on the theory the petitioners argue.

This position is certainly not a negation of the escalator principle as petitioners intimate. That principle has been often applied, but it is not applied as a means of giving re-employed veterans preferential treatment over that accorded non-veteran employees. There is nothing in the principle that renders the decision in question here subject to attack.

Conclusion.

Petitioners are here attacking the vacation pay provisions of a collective bargaining agreement which were adopted after long negotiations between their own collective bargaining agent, the Union, and respondent. Under the terms of that agreement they are not entitled to vacation pay any more than any non-veteran employee of respondent who had no 1945 gross earnings. Unless petitioners are entitled to preferred treatment by giving them rights denied respondent's non-veteran employees on furlough or leave of absence in 1945, the Court below could reach no other decision.

The petition is without merit and should be denied.

Respectfully submitted,

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